



12 April 2013

Ms Julie Dennett  
Committee Secretary  
Standing Committee on Legal and Constitutional Affairs  
PO Box 6100  
Parliament House Canberra ACT 2600

By email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Ms Dennett,

**Inquiry into the impact of federal court fee increases since 2010 on access to justice in Australia**

1. Women's Legal Services NSW (WLS NSW) thanks the Standing Committee on Legal and Constitutional Affairs for the opportunity to comment on the impact of Federal Court fees increases since 2010 on access to justice in Australia.
2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. Many of the women we work with experience multiple disadvantages, which commonly include economic hardship and a history of family violence.
3. In summary, we welcome the reintroduction of fee waivers and exemptions for individuals who are suffering financial disadvantage. We consider this to represent a positive step towards improving access to justice in the family law system by the most disadvantaged women in our community. We welcome the abolishing of the flat (court) fees for disadvantaged litigants in family law matters, which were introduced in 2011, and the re-instating of fee waivers for such litigants. We refer to comments we made in the National Association of Community Legal Centre's submission to the Attorney-General's Department about the barriers the \$60-\$80 fees would impose on disadvantaged litigants, including victims of domestic violence seeking to access justice who may sacrifice safety due to the cost of an initiating application.<sup>1</sup> Our concern, however, relates to the ongoing divorce application fee and decree of nullity of marriage application fee (divorce/nullity application fees) (albeit those at reduced rates) and we submit that to ensure improved access to justice to the family law system, the divorce/nullity application fees should also be waived for those suffering financial disadvantage.

**Access to justice**

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<sup>1</sup> NACLCLC, Submission to the Australian Attorney-General's Department on federal court fee increases, 8 July 2011 accessed on 12 April 2013 at: [http://www.womenslegalsw.asn.au/downloads/law-reform/2011NACLCLC\\_AGD\\_FederalCourtFees.pdf](http://www.womenslegalsw.asn.au/downloads/law-reform/2011NACLCLC_AGD_FederalCourtFees.pdf)



4. In a recent speech entitled 'Pro Bono – An Ethical Obligation or a sign of Market Failure' delivered at the Victorian Bar Third annual CPD Conference, the Honorable Mark Dreyfus, Attorney-General spoke about access to justice and advised that 'I know this idea of universal access to justice is an ideal. And its an ideal that neither we, nor any other society I know of, has fully realized. But it is an ideal that we should be working toward'.<sup>2</sup>
5. We consider that waiving court fees for individuals suffering hardship is an example of the Australian Government "doing what it can" to promote greater access to justice by removing a barrier for many individuals in the family law system. Government funded legal assistance and reduced court fees play a vital role in enhancing justice for disadvantaged Australians. For this reason, we submit that a fee waiver (applying to all court fees including divorce/nullity applications) should be applied in the Family Court for all those experiencing financial hardship.

#### **Increase in fees for divorce applications**

6. We are concerned by the significant increase in the divorce application fees. From 1 January 2013, the divorce application fee increased to \$265 for those who previously paid \$60.
7. This represents almost the entire weekly Newstart allowance and over 80% of the weekly single parent payment. We believe that unless fee waivers apply to divorce applications, the increased fee will mean that the choice to apply for a divorce will not be an option for many of our clients. The prohibitive cost will disproportionately affect women who have primary responsibility for the care of children and who are also reliant on social security benefits and will limit their access to the justice system in a way that does not impact on those who are not reliant on social security benefits.
8. We raise similar concerns about the reduced fee for decree of nullity of marriage, which is \$375.
9. The increase will also likely mean that we will be prevented from assisting clients in making a divorce/nullity application without an upfront payment of the fee. In addition to the flat fee, many clients struggle to pay other fees associated with divorce, including obtaining a copy of a marriage certificate, translation of marriage certificate, affidavit of translator, or the cost of a newspaper advertisement for substituted service. These additional (and often mandatory) costs for clients suffering financial disadvantage further illustrate the importance of a fee waiver for divorce/nullity application fees.
10. The financial hardship faced by women is particularly exacerbated following a marital breakdown. Despite some changes in recent times, as an overall trend the husband remains the primary breadwinner in many relationships. Therefore, when a relationship breaks down, women's financial hardship so often increases. This is particularly the case for women who are unable to work in paid employment due to childcare obligations. The effect of the increased divorce/nullity application fees is therefore exacerbated by the increased financial hardship faced by many women following separation.
11. Women who have encountered domestic violence in their relationship experience a substantial level of financial strain following separation, which causes the impact of the increased divorce/nullity fees to be heightened. The Australian Domestic & Family Violence Clearing House published research in 2011 that examined the impact of

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<sup>2</sup> The Honorable Mark Dreyfus, Attorney-General 'Pro Bono – An Ethical Obligation or a sign of Market Failure' (speech) delivered at the Victorian Bar Third annual CPD Conference at Melbourne (16 March 2013).

domestic violence on women's economic wellbeing and the intersection of this with recovery overall.<sup>3</sup> Their report entitled 'Seeking Security: promoting women's economic wellbeing following domestic violence' concludes that 'for women experiencing domestic violence, financial security goes to the heart of not only their freedom from abuse, but also their recovery and capacity to regain control over their lives, now and in the future'.<sup>4</sup> The increased divorce/nullity application fees, therefore, represents an additional obstacle for these women who are already financial disadvantaged and are attempting to regain control over their lives and futures.

12. Divorce or decree of nullity of marriage can be particularly important for women who have experienced family violence when trying to end the violence. It can bring finality, and positively impact on health and emotional well-being and plays an important role in the healing and empowering process. It may also be required for safety reasons. Notably, there is no other way to obtain a divorce or decree of nullity of marriage under Australian law except through the court process. Given the importance of divorce for women who have experienced violence and the deleterious effect on of the proposed fee increase for divorce on women, we call for fee waivers for financial hardship to be extended to all family law matters including applications for divorce/decreed of nullity of marriage.
13. As stated above, women who have experienced domestic violence face enhanced financial difficulties following the end of violent relationships but often seek a divorce for safety and protection. The increased fee is in a sense a "double jeopardy" for these women because they are on one hand in the greatest need of a divorce (i.e. to achieve the protection and security and move forward) but on the other hand will also face the greatest difficulty in raising the fee due to their lack of financial security following separation.
14. In addition, we note that women in prisons face particular difficulty in paying the divorce application fee. For example, a client in prison seeking a divorce may receive as little as \$13 a week, which is used to pay for phone calls to family and friends, toiletries, additional food and sometimes a compulsory victims of crime compensation levy and potentially retribute payments. To then save the required amount of money for the divorce application fee is difficult to almost impossible for some women.
15. An example of the difficulty faced by women in prison in raising the divorce application fee is a client in prison who has no savings and the only contact she has with the outside world is her mother who is elderly and on a Centrelink pension. This client is unable to raise the funds herself which illustrates the problems associated with the increased divorce application fee for women in prisons.
16. On 29 January 2013, we received a letter from the Honourable Nicola Roxon, Attorney-General advising us that the changes to court fees are part of wider reforms to ensure greater accessibility and timely resolution of disputes. The letter provided a policy justification for why the divorce application fee was not waived in the same manner as other family court fees and provided that the "two-third reduced fee in divorce matters accounts for the nature of divorce applications, in that they have specific longer term timelines and applicants can therefore make allowance for the need to pay the fee." Ms Roxon then advises that if a case is urgent, an applicant could apply for a deferral of the divorce fee to allow the matter to proceed prior to payment.
17. While the potential to defer payment is a positive mechanism in the regulation, we think

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<sup>3</sup> Rochelle Braaf & Isobelle Barrett Meyering 'Seeking Security: promoting women's economic wellbeing following domestic violence' (March 2011).

<sup>4</sup> Ibid.

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that it does not fully address the issue in the sense that the Applicant is still required to pay the fee; albeit that such payment becomes a debt rather than a payable fee. In addition, the regulation is silent on when the Court will exercise its discretion with respect to accepting deferred payment. For the reasons set out above, we submit that a waiver should apply to all Family Court fees for people experiencing financial hardship. While we understand that because of timelines a person getting divorced has a longer period to raise the funds we do not think that this justifies the amount payable.

18. Ms Roxon's letter went on to state that the increased court fees will ensure that courts can continue to deliver key services, including in family law and regional circuit work which is vital to the disadvantaged women litigants that we so often assist.
19. While we obviously welcome these changes (and any improved services that such changes bring) we think that the Government should implement the waiver of court fees for clients facing financial hardship and recover those unrealised fees by developing a payment scheme in property matters where court fees are determined in relation to the value of the asset pool. For example, the court could impose a fee that is calculated at the end of litigation and then paid by parties where the assessed value of the asset pool exceeds a certain amount (i.e. \$1 million).
20. We think that this type of scheme would appropriately balance the need to improve court resources by raising funds from court fees while improving access to justice for disadvantaged litigants. Essentially it would be a way of ensuring that those *with* the capacity to pay higher fees *do* pay and those *without* the capacity to pay are excused.

Yours sincerely,

Kirsty Irving  
Solicitor, Indigenous Women's Legal Program